

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 312 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL and  
MR.JUSTICE S.M.SONI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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GARDEN SILK MILLS LTD

Versus

DEPUTY COMMISSIONER OF INCOME TAX

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Appearance:

MR JP SHAH for Petitioner

MR M.J.Thakore for M/s.M R BHATT & Co.for Respondent

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CORAM : MR.JUSTICE B.C.PATEL and  
MR.JUSTICE S.M.SONI

Date of decision: 20/06/96

ORAL JUDGEMENT (Per B.C.Patel J.)

Petitioner, by preferring this petition under Article 226 of the Constitution of India, has challenged the issuance of notice under sec.148 of the Income-Tax

Act, 1961 (hereinafter referred to as "the Act") at Annexure J, which is dated 28.12.94. The assessing Officer had reason to believe while assessing the case of the assessee for the assessment year 1989-90 that there is escapement and, therefore, the notice was issued and the assessee was called upon to answer the notice within a period of 30 days. The assessment order for the relevant year is annexed at Annexure D and it appears that the assessee has been assessed under sec.143 (3) of the Act and the detailed order has been passed on 31.3.92. While assessing, the assessing officer has referred to the investment allowance specifically in the assessment order at page 6. Mr.Shah has pointed out that the said order of assessment was called in question by the Commissioner of Income-tax, Surat vide Annexure E dated 31.1.94 by issuing a notice under sec.263 of the Act and the order passed by the Commissioner of Income Tax under sec.263 is annexed to the petition at Annexure G. By the said order, the Commissioner had remanded the matter to the Assessing Officer with certain directions. It appears that thereafter Assessment Order has been passed vide Annexure I by the Deputy Commissioner of Income-Tax on 21.4.94. After that order being passed, the impugned notice under sec.148 has been issued on 28.12.94, which is under challenge.

It appears that in respect of foreign currency loan obtained to finance machinery installed in 1987-88 assessment year, liability on repayment increased during the year by Rs.1,83,88,188/- on account of fluctuation in exchange rate. The increase in liability, as averred by the assessee, relates back to the year of 1987-88 assessment year when machinery was acquired. Under the circumstances, as averred by the assessee, aforementioned amount would form part of "Actual cost" and additional investment allowance of Rs.45,97,047/- is allowable for 1987-88 assessment year. Assessee claimed depreciation on Rs.1,83,88,188/- and claimed additional investment allowance of Rs.45,97,047/-. The assessing officer allowed the claim of depreciation and with regard to investment allowance, raised a query vide letter dated 16.1.92. The assessing officer has dealt with the question of investment allowances under a separate heading and rejected the same. Thereafter, the Commissioner of Income-tax, as stated earlier, issued notice under sec.263 and has specifically held as under:-

"Thus, it is clear that for the purposes of allowance of depreciation, there is no pre-condition of actual repayment of foreign currency loan and on this count, the submissions

raised on behalf of the assessee company are entirely correct. For this reason, it can be said that the Assessing Officer had not erred in law in admitting the claim of the assessee, in relation to the dispute under consideration".

It appear that the Assessing Officer was called upon for checking up the arithmetical accuracy of the impact of foreign exchange rate fluctuation.

Mr.Shah thus pointed out from the record that the assessee has disclosed fully and truly all material facts necessary for its assessment for the relevant year and, therefore, there was no question of issuance of notice. He further submitted that reading the orders, which are placed on the record, it is impossible to allege against the assessee that it has not disclosed facts fully and truly necessary for the relevant assessment year. He further pointed out that even Commissioner has not doubted the manner or method of disclosure by the assessee. He has contended that even in absence of Commissioner's order, sec.147 notice is invalid and without jurisdiction. He further contended that it does not give power to the Assessing Officer to revive or review the decision of the Commissioner. He drew our attention to proviso to sec.147 of the Act, which reads as under:-

"Provided that where an assessment under sub-section (3) of section 143 has been made for the relevant assessment year, no action shall be taken under this section after expiry of four years from the end of the relevant assessment year unless any income chargeable to tax escaped assessment for such assessment year by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year".

It is clear from the record that notice has been issued after a period of four years. Therefore, without any whisper that assessee has failed to disclose fully and truly all material facts necessary for assessment for the relevant year, the notice could not have been issued.

With the affidavit-in-reply, reasons dated 19.12.94 passed by Deputy Commissioner of Income-Tax is placed on record. It is very clear from the reasons that four years have lapsed and, therefore, permission of the

Commissioner is sought for issuance of notice under sec.148 of the Act.

Without going into the aspect whether the Commissioner has given sanction for issuance of notice or not, the petition is required to be allowed on the short ground that reading the reasons which are placed on record with the affidavit-in-reply, there is not a whisper to indicate that the assessee has failed to disclose fully and truly all material facts necessary for assessment for the relevant year. Reading the reasons, it appears that Assessing Officer was aware about the investment and fluctuations in exchange rate. It is specifically mentioned that the position was in any case not verified on this point at the time of completing assessment, but it is further stated that the assessee was allowed depreciation on such enhanced cost. From the reasons, it is very clear that the facts were stated. In absence of material claiming depreciation, there was no question of allowing depreciation. Mr.Thakore, learned counsel even after going through the record could not point out that there is failure on the part of the assessee to disclose fully and truly all the material facts necessary for assessment for the relevant year. In view of this, this petition is required to be allowed. Petition stands allowed accordingly. Notice at Annexure J dated 28.12.94 is hereby quashed and set aside. There will be no order as to costs.

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